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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 145

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

J. N. FLOWERS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR REHEARING

J. N. FLOWERS
By James N. Ogden,
Counsel.

January, 1946.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR REHEARING

To the Honorable, the Supreme Court of the United States:

Comes now J. N. FLOWERS, Respondent in this case, and respectfully petitions the court for a rehearing and assigns as grounds the following:

I.

THE OPINION OF THE COURT RENDERED HEREIN ON JANUARY 2, 1946, MAKES THE DECISION TURN UPON A POINT RAISED BY THE COURT AFTER THE CAUSE WAS SUBMITTED, A POINT OR ISSUE NOT CONSIDERED BY THE TAX COURT OR THE COURT OF APPEALS OF THE FIFTH CIRCUIT AND NOT RAISED OR DISCUSSED BY COUNSEL IN BRIEFS OR IN ORAL ARGUMENT.

THE SAID POINT OR ISSUE IS AS TO THE MEANING OF THE WORD "BUSINESS" APPEARING IN THE CLAUSE IN SECTION 23(a)(1)(A) READING "TRAVELING EXPENSES (INCLUDING THE ENTIRE AMOUNT EXPENDED FOR MEALS AND LODGING) WHILE AWAY FROM HOME ON *BUSINESS*" (Emphasis Supplied), THE COURT INTERPRETING THE TERM AS MEANING "BUSINESS OF THE EMPLOYER."

The case was tried in the Tax Court and in the Court of Appeals as one involving the business of the taxpayer and, specifically, deductions claimed by the taxpayer from his gross income for expenses incurred by the taxpayer in the pursuit of his own trade or business. It has not been contended by counsel on either side that inquiry should be made as to whether the expenses claimed were incurred in the promotion of the business of the taxpayer's employer. It is not the railroad who is claiming the deduction; it is not the railroad's income sought to be taxed. The question of the relation of the expenses to the business of

the taxpayer's employer was not treated as an issue by the Tax Court or by the Court of Appeals, and was not considered by either of them; was not raised by counsel for the Commissioner in their assignment of errors in this Court or in their brief. The Court raised the issue after the cause was submitted. Hence it is that counsel for the Respondent has not had any opportunity to be heard on this new question. That a question was not raised in the courts below and was not raised by counsel in their assignment of errors but was discovered by the Court after final submission should be sufficient to support a petition for rehearing.

Especially should the discovery by the Court of an issue after the cause is finally submitted call for a rehearing where the newly discovered issue is made the controlling one. Here the majority opinion bases the reversal upon its finding that the word "business" as used in the statute refers to the business of the employer. No such meaning has been attributed to the word by the Commissioner in any instance as far as we are advised and certainly no such meaning has been attributed to the word by counsel for the Commissioner in this cause.

It is to be noted that the Court refers to no precedent for its definition of the word "business" as "business of the employer". It is also to be noted that, in this connection, no mention is made of Treasury Regulations 103, Sec. 19.23(a)-1 and Sec. 19.23 (a)-2. The first of these sections expressly relates the "deductible" expenses with "the taxpayer's trade or business". *This is directly opposed to the definition the majority opinion adopts.* This Regulation is relied

upon by the Government and is reproduced in full in the appendix to the brief for the Commissioner in this Court. It is the same language that appeared in its predecessors beginning with Article 101 of Regulations 65 promulgated under the Revenue Act of 1924. The above-quoted portion of Sec. 19.23(a)-1 deals *generally* with deductible business expenses, but in the majority opinion the Court has held that traveling expenses make up one of the items, "one of the specific examples given by Congress in that section [Sec. 23(a)(1)(A)]. 'of ordinary and necessary expenses paid or incurred in the taxable year in carrying on any trade or business' ". In other words, the Regulation (19.23(a)-1) undertakes to explain Sec. 23(a)(1)(A) of the Code. It is the *taxpayer* whose income is being dealt with; it is his business with relation to which deductible expenses must have been incurred; it is his own net income that is to be computed; it is amounts expended by him in the pursuit of *his own* business that are deductible from his gross to determine his net. We respectfully suggest that the Court has overlooked this Regulation of long standing, the Regulation relied upon by the Commissioner in this case. It appears quite clear why counsel for the Government were not in position to contend for the interpretation which the Court has adopted.

And now we call attention to paragraph (a) of Sec. 19-23(a)-2, set forth in full at Page 36 of the brief for the Commissioner. This Regulation deals *specifically* with traveling expenses as business expenses. The said paragraph is:

> "(a) If, then, an individual, whose business requires him to travel, receives a salary as full

compensation for his services, without reimbursement for traveling expenses, or is employed on a commission basis with no expense allowance, his traveling expenses, including the entire amount expended for meals and lodging, are deductible from gross income."

It is clear that in applying this Regulation no inquiry needs to be made as to whether the expenditures for meals and lodging were of benefit to or helped to promote the business of the employer of the taxpayer who made the expenditures. The Regulation deals with the taxpayer as *having a business of his own although he may be employed by another*. His business is to perform the services that he has contracted to perform; to do the work he has obligated himself to do is his occupation, his trade or business, whoever may be interested in the results of his activities. The citizen may thus create for himself a business. In the pursuit of the business thus created he receives an income and the statute and the Regulations both recognize his right to deduct the expense he incurs in carrying on his business. In the majority opinion the above quoted Regulation is indorsed, "is deemed to possess implied legislative approval and to have the effect of law". And while the opinion quotes other portions of Sec. 19.23(a)-2 it makes no mention of the above quoted paragraph, *the one directly applicable to the instant case.*

When we venture the statement that paragraph (a) above quoted rules this case if applied as written, we recognize that the answer that has been offered throughout this hearing is still available, and that is, that this taxpayer was not traveling on business when

he incurred the expenses which he deducted. That is the only answer. If this taxpayer was "traveling" within the meaning of paragraph (a), then he is entitled to the deduction; and he was so traveling unless the word "home" is to be given the meaning that the Commissioner and the Tax Court attribute to it. In other words, we come back to the issue which the Court has put to one side as not necessary to be passed upon, that is, as to the meaning of the word "home". If paragraph (a) applies here, the judgment of the lower court should be affirmed. It does apply, if this taxpayer was traveling away from home on business. He was so traveling unless his "home" was his "principal post or place of employment".

II.

EVEN THOUGH, IN THE VIEW OF THE COURT, THE ISSUE AS TO WHETHER THE EMPLOYE'S TRAVELING EXPENSES MUST BE RELATED TO THE BUSINESS OF THE EMPLOYER IS PRESENTED BY THE RECORD, IT IS NOT OPEN TO DISPUTE THAT THE SAID ISSUE HAD NOT BEEN RAISED BY COUNSEL AND WAS NOT RECOGNIZED BY THE COURT OF APPEALS AS AN ISSUE IN THE CASE AND WAS NOT MENTIONED BY THE TAX COURT.

It is not often that this Court will permit counsel to have another try at issues which they have already argued but it would not appear to be fair to deny the opportunity to have one try at whatever important issue may be involved in a case before this Court even though it should be thought that counsel themselves,

before the cause was submitted, should have discovered the issue. Counsel can hardly be charged with lack of attention when an issue, as is the one here involved, is so concealed as to escape the notice of the Tax Court and of the Court of Appeals and so obscure as to escape the attention of experienced counsel for the Government who are presumed to know all the definitions of statutory terms that the Commissioner adopts in his eagerness to collect taxes. We also have the support of the learned author of the dissenting opinion who found the only issue presented by the record to be as to the meaning of the word "home".

We call attention to the enumeration of conditions which the majority opinion says must be satisfied to support a claimed deduction of traveling expenses.

"(1) The expense must be a reasonable and necessary traveling expense, as that term is generally understood. This includes such items as transportation fares and food and lodging expenses incurred while traveling.

"(2) The expense must be incurred 'while away from home'.

"(3) The expense must be incurred in pursuit of business."

That statement of conditions follows the statute. Without the Court's explanation of number 3 it would be clear that they have all been met by the taxpayer here. It is the explanation of number 3 that introduces the issue that counsel and courts have not dealt with or recognized as being presented by this record. The issue

is created by the addition of the words "or of his employer" at the end of the first sentence of the explanation. Thenceforth the opinion deals with the inquiry as to the relation of the claimed expenditures to the business of the railroad, deals with the taxpayer as having no business, and finds that the "discussion (by the Tax Court) was directed mainly toward the relation of the expenditures to the railroad's business"! (In the light of that statement we ask the Court to read again the opinion of the Tax Court, Tr., page 21.)

In the course of the majority opinion the following statement appears: "There is no claim that the Tax Court misconstrued this condition (referring to condition number 3) or used improper standards in applying it". This statement of the Court, to have any validity, must presuppose that the "condition" with its explanation has been before the courts and counsel throughout. But the condition as explained made its first appearance in the opinion of this Court; counsel could not question it or question the action of the trial court with respect to it because they did not know that it was in existence.

III.

THE FACTS ACCEPTED BY THE MAJORITY AS BEING ESTABLISHED REQUIRE AN AFFIRMANCE OF THE JUDGMENT OF THE COURT OF APPEALS PROVIDED THAT COURT CORRECTLY DEFINED THE WORD "HOME" UNLESS IT SHOULD BE DECIDED THAT AN EMPLOYE DOES NOT HAVE A TRADE OR BUSINESS.

The following are admitted facts.

1. The taxpayer had his permanent home in Jackson. He had lived continuously on the same lot since 1912 and in Jackson since 1903.

2. He accepted employment to perform professional services away from home.

3. His employment required that he make trips away from his home in order to perform the services for which he received compensation.

4. All the expenses for which he claimed deductions were incurred on business trips.

5. The expenses were reasonable and necessary, were for food, lodging and travel.

The statute and the Regulations, taken at their face value, allow the deductions in cases where the above enumerated facts are found.

a. The Tax Court applied the statute and the Regulations as written except that it attributed to the work "home" a special meaning. Hence it denied the deduction on the ground that the taxpayer was not

"away from home". That this is the basis of the Tax Court's decision is unmistakably evidenced by the nature of the authorities cited (Tr. 21). Bixler, Peters, and Priddy were all away from their regular homes when the expenses claimed as deductions were incurred. The Tax Court disallowed the deductions because the word "home" was treated as meaning the principal post of employment. There is no intimation that the Tax Court even thought of inquiring whether the expenses were to be related to the employer's business. To inject that consideration into the Tax Court's reasoning is to pursue a course which the learned author of the majority opinion himself condemned in *Commissioner* v. *Scottish-American Investment Company*, 323 U. S. pp. 123-124.

b. Then this Court declines to following the apparent meaning of the statute and the plain meaning of the Regulations and denies the deduction, not on the ground that the taxpayer was not "away from home", but on the ground that the expenses incurred were not related to the business of the taxpayer's employer.

Both denials of the deduction, that by the Tax Court and that by this Court, subtract something from the par value of the statute. Neither of them depends upon any regulations' definitions of the words involved.

The reason is not clear why the Court and the Commissioner should be so concerned with the selection by the citizen of a location for his home establishment. It is apparent that the Congress has faithfully tried to impose the tax on no more than net income;

has tried to give full recognition to the fact that there is no net until incidental expenses are paid, has manifested no purpose to require a citizen to establish his home in such way as to reduce the expense incidental to the earning of his income. In special instances where net income worked out under general rules for year periods has not seemed to produce equitable results the Congress has drawn upon its recently discovered stock of "grace" in order more accurately to achieve the purpose of taxing not more than net income. Such failures of the general rules to produce equitable results have been occasions for the use of "grace". *Woolford Realty Company* v. *Rose*, 286 U. S. 319; *Planters Cotton Oil Company* v. *Hopkins*, 286 U. S. 332. The statutory plan is (1) to impose a tax on net income (Sec. 11); (2) ascertain gross income (Sec. 22); (3) deduct expenses and losses incurred in earning the income (Sec. 23); (4) deduct from the net income a stated sum to take care of the personal living expenses of the taxpayer and his family, items given preference over taxes (Sec. 25). The statute contains no remotest suggestion that a taxpayer should have his home where he works. That limitation upon the right of the taxpayer to deduct incidental expenses originated with the Board of Tax Appeals in the *Bixler* case. And it has never been embodied in the Regulations.

IV.

THE RIVAL THEORIES.

1. The Tax Court and the Court of Appeals both dealt with the taxpayer as having a trade or business

as those terms are used in Sec. 23 of the Code. The Court of Appeals would have affirmed the action of the trial court if it had agreed with the latter on the meaning of the word "home". Both assumed that the taxpayer was pursuing a "trade or business" without inquiring whose "trade or business" it was. (The statute reads "a trade or business"). And we have seen that paragraphs (b) and (c) of Sec. 19.23(a)-2 of Regulations 103 treat an employe as having a trade or business of his own. 4 Mertens, Law of Federal Income Taxation, Sec. 25.85. And the minority opinion of this Court follows the same theory.

2. The majority opinion finds it unnecessary to define the word "home"; takes up the word "business" and defines it; and then reaches the conclusion that the taxpayer's traveling did not relate to or promote the "business" as it defines that term.

It is to be kept in mind that no definition of "home" or of "business" appears in the Regulations. And further that there has been no such uniform and certain use of the definition of "home" that the Commissioner proposes as to impute the scienter to Congress that an amendment of the statute was ripening in the Bureau of Internal Revenue. Certainly Congress is not to be assumed to have knowledge of something that the courts are not able to find after trials involving the very issue as to whether a modification of a statute has been effected by administrative action.

We experience some difficulty in determining what the language of the Court means, just what the reasoning is. The travel expense provision is for the benefit

of individuals. Corporations do not travel; only individuals travel. If the employer in this instance had contracted with the taxpayer to pay him a salary plus the expenses of his trips to Mobile, certainly the railroad would have been entitled to the deduction. And under paragraph (b) of Sec. 19.23(a)-2 of Regulations 103 he would have been required to include the expenses of his trips in his gross income. The railroad would have the deduction of the amount as an expense item. In other words, if the railroad had paid the expenses the deduction would have been allowed. It is not clear why it should not be allowed if paid by the taxpayer out of his salary. And if the railroad had paid the expenses and taken the deduction the loss in revenues to the Government would have been much larger than if the deductions were taken by the taxpayer. No reason appears why, if the railroad paid the expense it would be deductible but not deductible if the employe pays it.

While the traveling expenses provision in Sec. 23(a)(1)(A) had in view the cases of traveling salesmen, most of whom are employes, it applies to others who follow a similar plan of earning income. It was intended to apply to all who make trips away from home as frequently as they deem such trips necessary to the proper performance of the duties of their employment. See 4 Mertens, Law of Federal Income Taxation, Secs. 25.82 - 25.85.

We are not able to determine whether the majority opinion permits inquiry into the reasons of the taxpayer for maintaining his home at a place distant from his post of employment when the reasonableness of expense items is an issue.

The decision as rendered, if allowed to stand, will not allay as much confusion as it will create.

For the reasons stated, we submit that this petition should be granted.

Respectfully submitted,

J. N. FLOWERS

By James N. Ogden,

Counsel.

January, 1946.

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition is presented in good faith and not for delay.

JAMES N. OGDEN,

Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 143.—October Term, 1945.

Commissioner of Internal Revenue, Petitioner, *vs.* J. N. Flowers.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[January 2, 1946.]

Mr. Justice Murphy delivered the opinion of the Court.

This case presents a problem as to the meaning and application of the provision of § 23(a)(1)(A) of the Internal Revenue Code[1] allowing a deduction for income tax purposes of "traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business."

The taxpayer, a lawyer, has resided with his family in Jackson, Mississippi, since 1903. There he has paid taxes, voted, schooled his children and established social and religious connections. He built a house in Jackson nearly thirty years ago and at all times has maintained it for himself and his family. He has been connected with several law firms in Jackson, one of which he formed and which has borne his name since 1922.

In 1906 the taxpayer began to represent the predecessor of the Gulf, Mobile & Ohio Railroad, his present employer. He acted as trial counsel for the railroad throughout Mississippi. From 1918 until 1927 he acted as special counsel for the railroad in Mississippi. He was elected general solicitor in 1927 and continued to be elected to that position each year until 1930, when he was elected

[1] 26 U. S. C. § 23(a)(1)(A), as amended, 56 Stat. 819.

"§ 23. Deductions from Gross Income.

"In computing net income there shall be allowed as deductions:

"(a) *Expenses.*—

"(1) *Trade or Business Expenses.*—

"(A) *In General.*—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity."

general counsel. Thereafter he was annually elected general counsel until September, 1940, when the properties of the predecessor company and another railroad were merged and he was elected vice president and general counsel of the newly formed Gulf, Mobile & Ohio Railroad.

The main office of the Gulf, Mobile & Ohio Railroad is in Mobile, Alabama, as was also the main office of its predecessor. When offered the position of general solicitor in 1927, the taxpayer was unwilling to accept it if it required him to move from Jackson to Mobile. He had established himself in Jackson both professionally and personally and was not desirous of moving away. As a result, an arrangement was made between him and the railroad whereby he could accept the position and continue to reside in Jackson on condition that he pay his traveling expenses between Mobile and Jackson and pay his living expenses in both places. This arrangement permitted the taxpayer to determine for himself the amount of time he would spend in each of the two cities and was in effect during 1939 and 1940, the taxable years in question.

The railroad company provided an office for the taxpayer in Mobile but not in Jackson. When he worked in Jackson his law firm provided him with office space, although he no longer participated in the firm's business or shared in its profits. He used his own office furniture and fixtures at this office. The railroad, however, furnished telephone service and a typewriter and desk for his secretary. It also paid the secretary's expenses while in Jackson. Most of the legal business of the railroad was centered in or conducted from Jackson, but this business was handled by local counsel for the railroad. The taxpayer's participation was advisory only and was no different from his participation in the railroad's legal business in other areas.

The taxpayer's principal post of business was at the main office in Mobile. However, during the taxable years of 1939 and 1940, he devoted nearly all of his time to matters relating to the merger of the railroads. Since it was left to him where he would do his work, he spent most of his time in Jackson during this period. In connection with the merger, one of the companies was involved in certain litigation in the federal court in Jackson and the taxpayer participated in that litigation.

During 1939 he spent 203 days in Jackson and 66 in Mobile, making 33 trips between the two cities. During 1940 he spent 168

days in Jackson and 102 in Mobile, making 40 trips between the two cities. The railroad paid all of his traveling expenses when he went on business trips to points other than Jackson or Mobile. But it paid none of his expenses in traveling between these two points or while he was at either of them.

The taxpayer deducted $900 in his 1939 income tax return and $1,620 in his 1940 return as traveling expenses incurred in making trips from Jackson to Mobile and as expenditures for meals and hotel accommodations while in Mobile.[2] The Commissioner disallowed the deductions, which action was sustained by the Tax Court. But the Fifth Circuit Court of Appeals reversed the Tax Court's judgment, 148 F. 2d 163, and we granted certiorari because of a conflict between the decision below and that reached by the Fourth Circuit Court of Appeals in *Barnhill* v. *Commissioner*, 148 F. 2d 913.

The portion of § 23(a)(1)(A) authorizing the deduction of "traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business" is one of the specific examples given by Congress in that section of "ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business." It is to be contrasted with the provision of § 24(a)(1) of the Internal Revenue Code disallowing any deductions for "personal, living, or family expenses." And it is to be read in light of the interpretation given it by Sec. 19.23(a)-2 of Treasury Regulations 103, promulgated under the Internal Revenue Code. This interpretation, which is precisely the same as that given to identical traveling expense deductions authorized by prior and successive Revenue Acts,[3] is deemed to possess implied legislative approval and to have the effect of law. *Helvering* v. *Winmill*, 305 U. S. 79; *Boehm* v. *Commissioner*, 326 U. S. —. In pertinent part, this interpretation states that "Traveling expenses, as ordinarily understood, include railroad fares and meals and lodging.

[2] No claim for deduction was made by the taxpayer for the amounts spent in traveling from Mobile to Jackson. He also took trips during the taxable years to Washington, New York, New Orleans, Baton Rouge, Memphis and Jackson (Tenn.), which were apparently in the nature of business trips for which the taxpayer presumably was reimbursed by the railroad. No claim was made in regard to them.

[3] Article 23(a)-2 of Regulations 101, 94, 86; Article 122 of Regulations 77 and 74; Article 102 of Regulations 69 and 65; Article 101(a) of Regulations 62.

If the trip is undertaken for other than business purposes, the railroad fares are personal expenses and the meals and lodging are living expenses. If the trip is solely on business, the reasonable and necessary traveling expenses, including railroad fares, meals, and lodging, are business expenses. . . . Only such expenses as are reasonable and necessary in the conduct of the business and directly attributable to it may be deducted. . . . Commuters' fares are not considered as business expenses and are not deductible."

Three conditions must thus be satisfied before a traveling expense deduction may be made under § 23(a)(1)(A):

(1) The expense must be a reasonable and necessary traveling expense, as that term is generally understood. This includes such items as transportation fares and food and lodging expenses incurred while traveling.

(2) The expense must be incurred "while away from home."

(3) The expense must be incurred in pursuit of business. This means that there must be a direct connection between the expenditure and the carrying on of the trade or business of the taxpayer or of his employer. Moreover, such an expenditure must be necessary or appropriate to the development and pursuit of the business or trade.

Whether particular expenditures fulfill these three conditions so as to entitle a taxpayer to a deduction is purely a question of fact in most instances. See *Commissioner* v. *Heininger*, 320 U. S. 467, 475. And the Tax Court's inferences and conclusions on such a factual matter, under established principles, should not be disturbed by an appellate court. *Commissioner* v. *Scottish American Co.*, 323 U. S. 119; *Dobson* v. *Commissioner*, 320 U. S. 489.

In this instance, the Tax Court without detailed elaboration concluded that "The situation presented in this proceeding is, in principle, no different from that in which a taxpayer's place of employment is in one city and for reasons satisfactory to himself he resides in another." It accordingly disallowed the deductions on the ground that they represent living and personal expenses rather than traveling expenses incurred while away from home in the pursuit of business. The court below accepted the Tax Court's findings of fact but reversed its judgment on the basis that it had improperly construed the word "home" as used in the second condition precedent to a traveling expense deduction under § 23(a)(1)(A). The Tax Court, it was said, erroneously con-

strued the word to mean the post, station or place of business where the taxpayer was employed—in this instance, Mobile—and thus erred in concluding that the expenditures in issue were not incurred "while away from home." The Court below felt that the word was to be given no such "unusual" or "extraordinary" meaning in this statute, that it simply meant, "that place where one in fact resides" or "the principal place of abode of one who has the intention to live there permanently." 148 F. 2d at 164. Since the taxpayer here admittedly had his home, as thus defined, in Jackson and since the expenses were incurred while he was away from Jackson, the deduction was permissible.

The meaning of the word "home" in § 23(a)(1)(A) with reference to a taxpayer residing in one city and working in another has engendered much difficulty and litigation. 4 Mertens, Law of Federal Income Taxation (1942) § 25.82. The Tax Court[1] and the administrative rulings[2] have consistently defined it as the equivalent of the taxpayer's place of business. See *Barnhill* v. *Commissioner*, *supra* (C. C. A. 4). On the other hand, the decision below and *Wallace* v. *Commissioner*, 144 F. 2d 407 (C. C. A. 9), have flatly rejected that view and have confined the term to the taxpayer's actual residence. See also *Cebuan* v. *Commissioner*, 138 F. 2d 763 (C. C. A. 2).

We deem it unnecessary here to enter into or to decide this conflict. The Tax Court's opinion, as we read it, was grounded neither solely nor primarily upon that agency's conception of the word "home." Its discussion was directed mainly toward the relation of the expenditures to the railroad's business, a relationship required by the third condition of the deduction. Thus even if the

[1] Bixler v. Commissioner, 5 B. T. A. 1181; Griesemer v. Commissioner, 10 B. T. A. 380; Brown v. Commissioner, 13 B. T. A. 832; Duncan v. Commissioner, 17 B. T. A. 1088; Peters v. Commissioner, 19 B. T. A. 901; Lindsay v. Commissioner, 34 B. T. A. 840; Powell v. Commissioner, 34 B. T. A. 655; Tracy v. Commissioner, 39 B. T. A. 578; Priddy v. Commissioner, 43 B. T. A. 18; Schurer v. Commissioner, 3 T. C. 544; Gustafson v. Commissioner, 3 T. C. 998.

[2] Section 19.23(a)-2 of Treasury Regulations 103 does not attempt to define the word "home" although the Commissioner argues that the statement therein contained to the effect that "commuters' fares are not business expenses and are not deductible" necessarily rests on the premise that 'home' for tax purposes is at the locality of the taxpayer's business headquarters." Other administrative rulings have been more explicit in treating the statutory home as the abode at the taxpayer's regular post of duty. See, e. g., O. D. 1021, 5 Cum. Bull. 174 (1921); I. T. 1264, I-1 Cum. Bull. 122 (1922); I. T. 3314, 1939-2 Cum. Bull. 152; G. C. M. 23672, 1943 Cum. Bull. 66.

Tax Court's definition of the word "home" was implicit in its decision and even if that definition was erroneous, its judgment must be sustained here if it properly concluded that the necessary relationship between the expenditures and the railroad's business was lacking. Failure to satisfy any one of the three conditions destroys the traveling expense deduction.

Turning our attention to the third condition, this case is disposed of quickly. There is no claim that the Tax Court misconstrued this condition or used improper standards in applying it. And it is readily apparent from the facts that its inferences were supported by evidence and that its conclusion that the expenditures in issue were non-deductible living and personal expenses was fully justified.

The facts demonstrate clearly that the expenses were not incurred in the pursuit of the business of the taxpayer's employer, the railroad. Jackson was his regular home. Had his post of duty been in that city the cost of maintaining his home there and of commuting or driving to work concededly would be non-deductible living and personal expenses lacking the necessary direct relation to the prosecution of the business. The character of such expenses is unaltered by the circumstance that the taxpayer's post of duty was in Mobile, thereby increasing the costs of transportation, food and lodging. Whether he maintained one abode or two, whether he traveled three blocks or three hundred miles to work, the nature of these expenditures remained the same.

The added costs in issue, moreover, were as unnecessary and inappropriate to the development of the railroad's business as were the personal and living costs in Jackson. They were incurred solely as the result of the taxpayer's desire to maintain a home in Jackson while working in Mobile, a factor irrelevant to the maintenance and prosecution of the railroad's legal business. The railroad did not require him to travel on business from Jackson to Mobile or to maintain living quarters in both cities. Nor did it compel him, save in one instance, to perform tasks for it in Jackson. It simply asked him to be at his principal post in Mobile as business demanded and as his personal convenience was served, allowing him to divide his business time between Mobile and Jackson as he saw fit. Except for the federal court litigation, all of the taxpayer's work in Jackson would normally have been performed in the headquarters at Mobile. The fact that he traveled frequently between

the two cities and incurred extra living expenses in Mobile, while doing much of his work in Jackson, was occasioned solely by his personal propensities. The railroad gained nothing from this arrangement except the personal satisfaction of the taxpayer.

Travel expenses in pursuit of business within the meaning of § 23 (a) (1) (A) could arise only when the railroad's business forced the taxpayer to travel and to live temporarily at some place other than Mobile, thereby advancing the interests of the railroad. Business trips are to be identified in relation to business demands and the traveler's business headquarters. The exigencies of business rather than the personal conveniences and necessities of the traveler must be the motivating factors. Such was not the case here.

It follows that the court below erred in reversing the judgment of the Tax Court.

Reversed.

MR. JUSTICE JACKSON took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES.

No. 145.—October Term, 1945.

Commissioner of Internal Revenue, Petitioner, vs. J. N. Flowers.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[January 2, 1946.]

Mr. Justice Rutledge, dissenting.

I think the judgment of the Court of Appeals should be affirmed. When Congress used the word "home" in § 23 of the Code, I do not believe it meant "business headquarters." And in my opinion this case presents no other question.

Congress allowed the deduction for "traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business." Treasury Regulations 103, § 19.23(a)-1, are to the same effect, with the word "solely" added after "home." Section 19.23(a)-2 also provides: "Commuters' fares are not considered as business expenses and are not deductible." By this decision, the latter regulation is allowed, in effect, to swallow up the deduction for many situations where the regulation has no fit application.

Respondent's home was in Jackson, Mississippi, in every sense, unless for applying § 23. There he maintained his family, with his personal, political and religious connections; schooled his children; paid taxes, voted, and resided over many years. There too he kept hold upon his place as a lawyer, though not substantially active in practice otherwise than to perform his work as general counsel for the railroad. This required his presence in Mobile, Alabama, for roughly a third of his time. The remainder he spent in Jackson at the same work, except for the time he was required to travel to points other than Mobile.

The company's principal offices were there, including one set aside for respondent's use. But the bulk of its trackage was in Mississippi and much of its legal work, with which he was concerned, was done there. His choice to keep his home in Jackson must have been affected by this fact, although it was motivated

chiefly by more purely personal considerations. It is doubtful indeed; though perhaps not material, whether by not moving to Mobile he did not save the Government from larger deductions on account of traveling expense than those he claimed.

There is no question therefore but that respondent's home was in Jackson for every purpose unless for the single one of applying § 23. Nor is it in doubt that he traveled from Jackson to Mobile and return, as he claimed, or that he spent the sums deducted for that purpose, including meals and lodging. Neither is it denied, as matter of fact, that his sole reason for going to Mobile was to perform his work as it required his presence there or that he returned to his home in Jackson periodically when his duties no longer required him to be in Mobile.

I think this makes a case squarely within the statute and the regulations. But the Tax Court ruled that the claimed deductions were, "personal, living, or family expenses." Because the taxpayer elected to keep his home in Jackson, rather than move to Mobile, and because his employer did not undertake to pay these expenses, it viewed the case as being the same as if he had moved to Mobile. In that event, it said, he would have been required to bear the expenses of his own meals and lodging. This is obvious, even though the "as if" conclusion does not follow. The court went on, however, to give the further reason for it: "The situation . . . is, in principle, no different from that in which a taxpayer's place of employment is in one city and for reasons satisfactory to himself he resides in another." It seems questionable whether, in so ruling, the Tax Court has not confused the taxpayer's principal place of employment with his employer's. For on the facts Jackson rather than Mobile would seem more appropriately to be found *his* business headquarters. But, regardless of that, the authorities cited[1] and the Government's supporting

[1] Frank H. Sullivan, 1 B. T. A. 93; Mort L. Bixler, 5 B. T. A. 1181; Jennie A. Peters, 19 B. T. A. 901; Walter M. Priddy, 43 B. T. A. 18.

The *Sullivan* case illustrates the typical commuter situation. The *Peters* case illustrates the extension of that ruling to greater distances and irregular travel.

Recent decisions, however, where the traveling distance is great, appear to go on the theory, presented in the instant case, that the word "home" within the meaning of § 23(a)(1) means "principal place of business." See Tax Court Memorandum Opinion, Dec. 13,853(M), 1 C. C. H. Tax Serv. 1945, p. 1268. Thus, Mertens says that the disallowance of traveling expenses to one's place of business "is based primarily on the requirement that the traveling expenses include only amounts expended 'while away from home.'" 4 Mertens, Law of Federal Income Taxation, 478.

argument show that the case was regarded as in essence the commuter's, excepted by the regulations.

Apart from this ruling, the Tax Court made no finding, of fact or law, that respondent was not engaged "in the pursuit of a trade or business"; that he was not "away from home"; that the expenses were not "business expenses" or "business traveling expenses"; or that they were not "ordinary and necessary." Yet by a merry-go-round argument,[2] which always comes back to rest on the idea that "home" means "business headquarters," the Government seeks to inject such issues and findings, including a *Dobson* (320 U. S. 489) contention, into the Tax Court's determination. I think there was only one issue, a question of law requiring construction of the statute as to the meaning of the word "home" and, if that is resolved against the Government, the Tax Court's judgment has no other foundation on which to stand. Every other contention falls when this one does. All stand if it is valid.

I agree with the Court of Appeals that if Congress had meant "business headquarters," and not "home," it would have said "business headquarters." When it used "home" instead, I think it meant home in everyday parlance, not in some twisted special meaning of "tax home" or "tax headquarters."[3] I find no purpose stated or implied in the Act, the regulations or the legislative history to support such a distortion or to use § 23 as a lever to force people to move their homes to the locality where their employer's chief business headquarters may be, although their own work may be done as well in major part at home. The only stated purpose, and it is clearly stated, not in words of art, is to relieve the tax burden when one is away from home on business.

The Government relies on administrative construction, by the

[2] Thus the assertion that the deductions were "not even 'business' expenses," is brought back to the meaning of "home" by the given reason that "'the maintenance of more than one dwelling place manifestly is not essential to the prosecution of a business.'" And this, in turn, completes the circle by resting on the conclusion that the taxpayer had two dwelling places, one in Mobile (presumably the hotel or hotels where he stopped) "where he resided during the periods the living expenses in question were incurred," the other in Jackson "where he resided during other periods." Likewise, the conclusion that the deductions were not "ordinary and necessary expenses," see note 8, depends on the view that Jackson was not "home" but Mobile was. So with the assertion that the "Mobile living expenses" were not "business traveling expenses."

[3] Cf. Cox v. Lott, 12 Wall. 204; Addison v. Holly Hill Co., 322 U. S. 607, 617, 618.

Commissioner and the Tax Court, and says that unless this is accepted the Act creates tax inequality. If so, it is inequality created by Congress, and it is not for the Commissioner or the Tax Court, by administrative reconstruction, to rewrite what Congress has written or to correct its views of equality. Moreover, in my opinion, the inequity, if any, comes not from the statute or the regulation but from the construction which identifies petitioner with a commuter.

That word too has limitations unless it also is made a tool for rewriting the Act. The ordinary, usual connotation, cf. 21 I. C. C. 428; *Pennsylvania R. Co.* v. *Towers*, 245 U. S. 6, 12, does not include irregular, although frequent journeys of 350 miles, requiring Pullman accommodations and some twelve to fifteen hours, one way.

Congress gave the deduction for traveling away from home on business. The commuter's case, rightly confined, does not fall in this class. One who lives in an adjacent suburb or city and by usual modes of commutation can work within a distance permitting the daily journey and return, with time for the day's work and a period at home, clearly can be excluded from the deduction on the basis of the section's terms equally with its obvious purpose. But that is not true if "commuter" is to swallow up the deduction by the same sort of construction which makes "home" mean "business headquarters" of one's employer. If the line may be extended somewhat to cover doubtful cases, it need not be lengthened to infinity or to cover cases as far removed from the prevailing connotation of commuter as this one. Including it pushes "commuting" too far, even for these times of rapid transit.[4]

Administrative construction should have some bounds. It exceeds what are legitimate when it reconstructs the statute to nullify or contradict the plain meaning of nontechnical terms not artfully employed. Moreover, in this case the matter has been held in suspension by litigation with varying results[5] and apparent quali-

[4] Conceivably men soon may live in Florida or California and fly daily to work in New York and back. Possibly they will be regarded as commuters when that day comes. But, if so, that is not this case and, in any event, neither situation was comprehended by Congress when § 23 was enacted.

[5] See Wallace *v.* Commissioner, 144 F. 2d 407 (C. C. A. 9); Coburn *v.* Commissioner, 138 F. 2d 783 (C. C. A. 2); and the decision now in review, 148 F. 2d 168 (C. C. A. 5), with which compare Barnhill *v.* Commissioner and Winborne *v.* Commissioner, 148 F. 2d 913 (C. C. A. 4).

fication by the Tax Court consequent upon some of the decisions.[6]

By construing "home" as "business headquarters"; by reading "temporarily" as "very temporarily" into § 23; by bringing down "ordinary and necessary" from its first sentence into its second;[7] by finding "inequity" where Congress has said none exists; by construing "commuter" to cover long-distance, irregular travel; and by conjuring from the "statutory setting" a meaning at odds with the plain wording of the clause, the Government nudges over understandable ordinary English into highly technical tax jargon. There is enough of this in the tax laws inescapably, without adding more in the absence of either compulsion or authority. The arm of the tax gatherer reaches far. In my judgment it should not go the length of this case. Congress has revised § 23 once to overcome niggardly construction.[8] It should not have to do so again.

[6] See Harry F. Schurer, 3 T. C. 554; Charles G. Gustafson, 3 T. C. 898; Mortimer M. Mahony, T. C. H. Tax Ct. Serv., Dec. 7,508(M), April 10, 1945; Charles J. McLennan, C. C. H. Tax Ct. Serv., Dec. 14,644(M), June 25, 1945; Robert S. Shelley, deceased, C. C. H. Tax Ct. Serv., Dec. 15,642(M), June 25, 1945.

[7] The language is: "All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; . . . ." § 23(a)(1)(A), Internal Revenue Code.

[8] The Treasury Regulations in force in 1926 allowed deduction of only the excess of the cost of meals and lodging away from home over the cost at home; and under earlier regulations none of this expense was allowed. Congress inserted the words "all" and "entire" in the 1921 Act to overcome this ruling.